

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY HOROWITZ,
Plaintiff-Appellee,

v

CITY OF SOUTHFIELD,
Defendant-Appellant.

UNPUBLISHED
March 27, 2007

No. 272902
Oakland Circuit Court
LC No. 2005-068291-NO

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

In this action involving an allegedly defective sidewalk, defendant appeals as of right from a circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity) and (10). The trial court concluded that plaintiff's failure to provide notice of the alleged sidewalk defect within 120 days after her fall, as required by MCL 691.1404, did not require dismissal because defendant was not prejudiced. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff alleges that she fell on August 9, 2003, when the tip of her right foot "caught on this raised part" and she fell face down on the sidewalk. After she fell, she walked back to see what happened and saw "where that was a very deep crevice, it looked to me fairly deep, enough to catch my toe and slam me down." She did not measure the depth of the crack. Plaintiff sent defendant a notice, dated March 29, 2004, concerning the alleged defect and her fall.

MCL 691.1404(1) states:

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

There is no dispute that plaintiff did not serve the notice within 120 days. But under current Supreme Court precedent, the failure to comply with the notice provision is not a bar to a claim

under the highway exception to governmental immunity absent a showing of actual prejudice. *Hobbs v Michigan State Hwy Dep't*, 398 Mich 90, 96; 247 NW2d 754 (1976); *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996).

Defendant contends that the trial court erred in denying its motion for summary disposition on the basis that it did not establish actual prejudice. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817(1999).

Notice provisions enable governmental agencies to investigate and gather evidence to evaluate a claim. *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997). "Prejudice refers to a matter which would prevent a party from having a fair trial, or matter which he could not properly contest." *Id.* (citations and internal quotation marks omitted).

In this case, the prejudice concerns loss of an opportunity to investigate the area in the condition that it existed at the time plaintiff fell. Plaintiff claimed that the crevice was "very deep" and caught her toe. Defendant was not notified until more than seven months later. The earliest photographs of the claimed defect that were presented in the case were purportedly taken in May 2004. Defendant's project engineering assistant, Alicia Miller, who was certified in concrete by the Michigan Concrete Association and the state, explained that it was "possible" that deterioration could have occurred in the nine months between the fall and the photographs. She noted an area where the concrete was a lighter color, which led her to believe "that at one point in time, but I cannot tell you exactly when, a piece of concrete was in there and possibly with a vehicle driving up over it, such as school buses, which we have noticed, it could've, it could've popped that out. And that looks recent, rather recent, because as the concrete weathers it darkens, and because this is a lighter color it makes me think it's a more recent pop-out." However, Miller could not determine the level of deterioration that existed in April 2003. She stated, "Concrete is known to be very unpredictable." Even if joint deterioration had occurred at that time, she could not determine whether there was more or less soil in any void that was present. When she examined the area in May 2006, the vertical differential was less than half an inch.

Plaintiff reasoned that if the condition remained generally the same between May 2004 and May 2006, then the defect was likely the same in April 2003. However, plaintiff did not present any expert testimony whatsoever, much less any evidence that the degree of change between May 2004 and May 2006 is indicative of the state of deterioration in April 2003.

To establish actual prejudice, defendant is not required to prove that evidence it could have obtained concerning the condition would have assisted the defense. "[I]t cannot affirmatively demonstrate that lost evidence would aid it for the very reason that it has been lost." *Blohm, supra*, p 390. Here, the delay in notification impeded defendant's ability to determine the state of the sidewalk when the fall occurred so that defendant is unable to properly contest plaintiff's description. This is actual prejudice, and plaintiff's claim is barred for her failure to comply with MCL 691.1404(1).

We also agree with defendant that the trial court erred in concluding that a question of fact existed regarding whether defendant had notice of the alleged defect. MCL 691.1402(a);

MCL 691.1403. Plaintiff's testimony indicated that she frequently walked along the sidewalk in question and had not seen the defect before her fall. Miller testified that there were no complaints concerning this particular sidewalk before plaintiff's fall. In response to defendant's motion, plaintiff argued that in light of the slow rate of deterioration evident by comparing the photographs from May 2006 and those purportedly taken in May 2004, a question of fact existed regarding whether the defect existed 30 days before plaintiff's fall. Although plaintiff surmises that the defect would have been apparent 30 days before plaintiff's fall because the condition did not change much between May 2004 and May 2006, this amounts to speculation and does not create an issue of fact. The trial court should have granted defendant summary disposition on this basis as well.

Finally, defendant argues that plaintiff failed to show that defendant had notice of a defect that made the sidewalk not "reasonably safe and convenient for public travel." Defendant did not advance this argument in its motion and supporting brief before the trial court. An issue not raised before and considered by the trial court is generally not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). However, this Court may properly review an issue if the question is one of law and the facts necessary for its resolution have been presented. *Id.*, pp 98-99.

"[A]n imperfection in the roadway will only rise to the level of a compensable 'defect' when that imperfection is one which renders the highway not 'reasonably safe and convenient for public travel,' and the government agency is on notice of that fact." *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006). Even if one assumed that the photographs taken several months after plaintiff's fall accurately depicted the condition of the sidewalk at the time of her fall, and that defendant had actual or constructive notice of that condition, reasonable jurors could not conclude that the condition as depicted rendered the sidewalk not "reasonably safe and convenient for public travel." Defendant was entitled to summary disposition on this basis as well.

Reversed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens